Police Dep't v. Rios

OATH Index No. 146/06, mem. dec. (July 21, 2005)

Petitioner failed to prove its entitlement to retain a seized vehicle as the instrumentality of a crime pending outcome of a civil forfeiture action. Judge orders the vehicle be released.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
POLICE DEPARTMENT
Petitioner
-against-
ANGEL RIOS
Respondent

MEMORANDUM DECISION

KARA J. MILLER, *Administrative Law Judge*

Petitioner, the Police Department, brought this proceeding to determine its right to retain a vehicle seized as the alleged instrumentality of a crime pursuant to section 14-140 of the Administrative Code. Respondent, Angel Rios, is the owner of the seized vehicle and was present at the time it was seized. This proceeding is mandated by *Krimstock v. Kelly*, 99 Civ. 12041 (MBM), amended order and judgment (S.D.N.Y. Jan. 22, 2004) (the "Krimstock Order"); *see County of Nassau v. Canavan*, 1 N.Y.3d 134, 770 N.Y.S.2d 277 (2003).

The vehicle in issue, a 1994 Chevrolet Suburban, voucher number B155001, was seized on May 15, 2005, in connection with respondent's arrest for driving while intoxicated. Following receipt of respondent's demand for a hearing on July 5, 2005, the Department scheduled a hearing for July 14, 2005 at 2:00 p.m. An adjournment was granted and the matter was rescheduled for July 18, 2005. Respondent appeared with counsel that day and contested the Department's petition.

Following the trial before me on July 18, 2005, I conclude that the Department is not entitled to retain the vehicle, and therefore, I order that the vehicle be released.

ANALYSIS

The Department seeks to sustain its retention of the seized vehicle as the instrumentality of a crime, rather than as evidence for a criminal case. Therefore, the Department bears the burden of proving three points by a preponderance of the evidence: (i) that probable cause existed for the arrest pursuant to which the vehicle was seized; (ii) that it is likely that the Department will prevail in a civil action for forfeiture of the vehicle; and (iii) that it is necessary that the vehicle remain impounded to ensure its availability for a judgment of forfeiture. *Krimstock*, Order at 3*; Canavan*, 1 N.Y.3d at 144-45, 770 N.Y.S.2d at 286.

The due process rights at issue here require an "initial testing of the merits of the City's case," not "exhaustive evidentiary battles that might threaten to duplicate the eventual forfeiture hearing." *Krimstock v. Kelly*, 306 F.3d 40, 69, 70 (2d Cir. 2002); *see Canavan*, 1 N.Y.3d at 144 n.3, 770 N.Y.S.2d at 286 n.3 (hearing is intended to establish "the validity, or at least the probable validity, of the underlying claim"; citation omitted).

The Department's evidence alleged that on May 15, 2005, respondent was observed exiting his vehicle and urinating on the sidewalk. It was noted that the key was in the ignition and the vehicle was turned on at the time. Respondent appeared to be intoxicated in light of his slurred speech, the odor of alcohol on his breath, and his unsteadiness on his feet. When questioned if he had been drinking, respondent acknowledged having had a few beers. Respondent submitted to a breathalyzer test which registered his blood alcohol content to be .093. Respondent was arrested and charged with two misdemeanor counts of driving while intoxicated and one misdemeanor count of driving while impaired.

Respondent testified that on the afternoon of Sunday, May 15, 2005, he played softball in a league on Randalls Island. The game started at approximately 12:15 p.m. and lasted approximately two and a half hours. Respondent maintained that he did not drink any alcohol before, during, or immediately after the softball game because he would have been subject to a fine and possibly have gotten kicked out of the league. After the game, respondent drove home and parked his vehicle across the street from his apartment building. He brought his softball equipment inside his apartment and had something to eat.

Respondent returned outside at approximately 5:00 p.m. and purchased some beer from a store located across the street from his apartment, on the same block where his car was parked. He eventually returned to his vehicle and proceeded to clean it. He opened the windows of the car and without turning on the engine, turned on the radio. He described the atmosphere on the street to be convivial, with people hanging out, drinking, listening to the radio, playing dominoes, and talking. Respondent testified that over the course of the evening he drank seven beers. After approximately three hours of playing the vehicle's radio, the sound started to weaken. Respondent worried that he was draining the battery, so without sitting inside the vehicle, he leaned in through the open driver's side window and turned on the ignition.

Shortly after turning on the ignition, respondent felt the sudden urge to urinate. Feeling that he did not have time to either walk to the store or his home to use a bathroom, he urinated on the curb side of his vehicle, which was also the passenger side. Respondent testified that as he finished relieving himself, he was approached by a police officer who asked if he had been drinking. He admitted that he had consumed a few beers. Expecting to be issued a summons for public urination, respondent was surprised when the police officer handcuffed him and arrested him for driving while intoxicated. Respondent denied operating the vehicle while intoxicated or impaired. He testified that once the vehicle was parked on his street at about 4:30 p.m., he never entered the driver's seat nor moved the vehicle for the remainder of the day.

Respondent presented the testimony of two witnesses, Michelle Figueroa and Luis Mateos, both of whom live in respondent's neighborhood and were present on the street when respondent was taken into custody. Ms. Figueroa testified that she was not present when respondent initially parked his vehicle, but was outside later that evening, talking with friends and listening to the music. She observed respondent on the passenger or curb side of the vehicle when the police officers approached him. She testified that she was surprised when they placed him in handcuffs.

Mr. Mateos testified that he and respondent were "hanging out," drinking beer and discussing the softball game while respondent cleaned his vehicle. He had observed respondent park the vehicle earlier in the day and had been with him the entire evening, up until right before he was arrested. Mr. Mateos was in the nearby store using the restroom when respondent was approached by the police officer. When he returned, Mr. Mateos was shocked that the police officer handcuffed

respondent. He asked why respondent was being arrested, but the officer told Mr. Mateos to mind his own business. Both Ms. Figueroa and Mr. Mateos corroborated respondent's description of the evening and confirmed that respondent never entered the vehicle nor moved it once it was parked.

Respondent did not contest the breathalyzer test results. Admittedly, respondent was intoxicated when the police officer observed him urinating next to his vehicle. He does, however, dispute that he was operating the vehicle while he was intoxicated.

It is well established that in New York State, an individual is considered to be operating a motor vehicle when he or she is sitting behind the wheel with the engine running, regardless of whether or not the vehicle is moving. New York courts have held that under these circumstances, an inference may be made that the individual had been driving or was about to drive. *See* NY Vehicle and Traffic Law § 1192 (Lexis 2005); *People v. Prescott*, 95 N.Y.2d 655, 662, 722 N.Y.S.2d 778, 782 (2001); *People v. Khan*, 182 Misc.2d 83, 84, 697 N.Y.S.2d 457, 457 (2d Dep't 1997); *People v. O'Connor*, 159 Misc. 2d 1072, 1074, 607 N.Y.S.2d 856, 858 (Dist. Ct. Nassau Co. 1994). Likewise, this tribunal has recognized that a person's presence in the driver's seat of a car, with the key in the ignition and the engine running is sufficient to support an inference that the person intended to put the car in motion. *See Police Dep't v. Anderson*, OATH Index No. 1127/05, mem. dec. (Jan. 13, 2005) (respondent found to be operating vehicle when found unconscious in the driver's seat with the keys in the ignition and the engine running); *Police Dep't v. Solomon*, OATH Index No. 1783/04, mem. dec. (Apr. 22, 2004) (respondent found to be operating vehicle when found in the driver's seat, slumped over the steering wheel with the keys in the ignition and the engine running).

The Department bears the burden of establishing that respondent was operating the vehicle. Both the property voucher (Pet. Ex. 1) and the arrest report (Pet. Ex. 5) indicate that the arresting officer observed respondent exit the vehicle and urinate by the curb. These documents further state that when the arresting officer approached respondent he noticed that respondent appeared intoxicated and he asked if respondent had been drinking. Respondent affirmatively replied that he had one and a half beers. These two documents are identical in describing the arresting officer's observations and actions. Although these documents state that respondent was observed exiting the

vehicle neither of them indicate that respondent was observed in the driver's seat or that the keys were in the ignition and the vehicle was running.

The verified criminal complaint (Pet. Ex. 4) states,

> Deponent of the 025 Precinct [stated] that informant observed the [respondent] operating a motor vehicle in that the key was in the ignition and the engine was running, and that the [respondent] was intoxicated in that informant observed that the [respondent] had slurred speech, had the odor of an alcoholic beverage on his breath and was unsteady on his feet.

(Pet. Ex. 4). While the complaint indicates that the key was in the ignition and the engine was running, it clearly fails to state that respondent was observed exiting the vehicle, as was indicated in both the property voucher and the arrest report.

The Department elected to use hearsay statements from the arresting officer to establish that respondent was operating the vehicle while intoxicated. Hearsay is admissible in administrative proceedings and may form the sole basis for a finding of fact. *See Police Dep't v. Ayala*, OATH Index No. 401/88 (Aug. 11, 1989), *aff'd. sub nom. Ayala v. Ward*, 170 A.D.2d 235, 565 N.Y.S.2d 114 (1st Dep't), *lv. to app. den.*, 78 N.Y.2d 851, 573 N.Y.S.2d 69 (1991). It must, however, be found to be sufficiently probative and reliable before it may be accorded any significant weight. In the present case, the reliability of the Department's hearsay evidence is undermined by its inconsistency, as well as the vagueness of the criminal complaint.

In contrast to the Department's hearsay documentary evidence, respondent testified at this instant hearing and presented testimony from two witnesses. In assessing credibility it is necessary to assess such factors as demeanor, consistency, and motivation. I found Ms. Figueroa, Mr. Mateos, and respondent to be credible witnesses. They did not exaggerate or embellish their testimony. Although respondent has a vested interest in the outcome of this hearing, his testimony was consistent and candid. Ms. Figueroa and Mr. Mateos were also consistent and corroborated respondent's account of what took place. While both Ms. Figueroa and Mr. Mateos live in respondent's neighborhood and are friendly with him, they have no apparent interest in the outcome

of this proceeding. Furthermore, Ms. Figueroa appeared on this matter twice due to an adjournment.[1] The fact that she returned on the second day to testify on respondent's behalf further enhances her credibility.

I find the hearsay documents offered by the Department insufficient to establish that respondent operated the vehicle while intoxicated, especially considering that the only sworn document failed to mention that the arresting officer observed respondent exiting the vehicle. Moreover, even if I were to find the Department's evidence sufficient to infer that respondent was operating the vehicle, respondent successfully rebutted that inference. Three witnesses who testified credibly at the hearing and were subject to cross-examination satisfactorily refuted the inconsistent hearsay statements from an arresting officer, who did not appear at the hearing. *See Police Dep't v. Diniso*, OATH Index No. 1476/00 (Apr. 20, 2001); *Police Dep't v. Ferrero*, OATH Index No. 381/01 (Jan. 5, 2001); *Health and Hospitals Corp. (Kings Co. Hospital Center) v. Moore*, OATH Index No. 2101/00 (Dec. 19, 2000).

The Department failed to establish probable cause for the arrest or that it will likely succeed at the forfeiture hearing because it was unable to prove that the police saw him inside the vehicle or that respondent was operating the vehicle while intoxicated. Therefore, it is unnecessary to address the third prong with respect to the necessity to retain the vehicle.

I find that the Department has failed to prove by a preponderance of the evidence that the vehicle was the instrumentality of the crime. Accordingly, the vehicle should be released.

ORDER

The Department is directed to release the respondent's vehicle.

Kara J. Miller
Administrative Law Judge

July 21, 2005

[1] Mr. Mateos was unable to take time off from work on the original trial date, but was able to appear on the adjourned date.

APPEARANCES:

JESSIE CROWLEY, ESQ.
Attorney for Petitioner

SILVANA BOGGIA, ESQ.
Attorney for Respondent